

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NORTH CAROLINA
3 ASHEVILLE DIVISION

08:59

4 SANDRA M. PETERS, on behalf of
5 herself and all others
6 similarly situated,

7 Plaintiff,

8 v.

Case No. 1:15-cv-00109-MR

9 AETNA INC., AETNA LIFE
10 INSURANCE COMPANY, and
11 OPTUMHEALTH CARE SOLUTIONS,
12 INC.,

13 Defendants.
14 _____/

15 TRANSCRIPT OF MOTION HEARING
16 Held before HONORABLE JUDGE MARTIN REIDINGER
17 Friday, March 1st, 2019
18 9:00 a.m. - 10:26 a.m.

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22 Court Reporter: Beverly Bourlier James, RPR
23 Stenograph with Computer Aided Transcription
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23 Also present: Shari Aberle, Optum
24
25

1 THE COURT: Good morning, everyone. 08:59

2 ALL PRESENT: Good morning, your Honor. 08:59

3 THE COURT: We have one matter that is on 09:00
4 the calendar for today and that is Peters versus 09:00
5 Aetna. We have it on for a class certification 09:00
6 hearing. 09:00

7 I see a number of lawyers, some of whom I 09:00
8 recognize and some of whom I do not. So I will 09:00
9 allow counsel to announce their appearance for the 09:00
10 record. 09:00

11 I'll start over at the Plaintiff's table, 09:00
12 Mr. McDevitt. 09:00

13 MR. McDEVITT: Your Honor, for the record, 09:00
14 my name is Larry McDevitt. I'm with the Van 09:00
15 Winkle Law Firm here in Asheville and appear on 09:00
16 behalf of the Plaintiff Peters and putative class. 09:00

17 With me today are my partner David 09:00
18 Wilkerson, who will not be participating in oral 09:00
19 argument but is involved in the case. We also 09:00
20 have two attorneys with the Zuckerman Spaeder 09:00
21 firm. You've met Jason Knott -- 09:00

22 MR. KNOTT: Good morning, your Honor. 09:00

23 MR. McDEVITT: -- here on my left. And 09:01
24 his partner Nell Peyser who is here with us today. 09:01

25 MS. PEYSER: Good morning, your Honor. 09:01

1 MR. McDEVITT: With the Court's 09:01
2 permission, I'll be taking the lead on the motion 09:01
3 to strike our expert, if the Court hears that, 09:01
4 with Mr. Knott's assistance, and he'll be taking 09:01
5 the lead on the motion for class certification. 09:01

6 THE COURT: Okay. Mr. Holman. 09:01

7 MR. HOLMAN: Your Honor, Tom Holman here 09:01
8 on behalf of the Aetna Defendants. Geoff Sigler 09:01
9 from Gibson Dunn will be arguing on behalf of the 09:01
10 Defendants this morning. 09:01

11 MR. BOONE: Good morning, your Honor. 09:01
12 Brian Boone from Alston & Bird for Optum. With me 09:01
13 today is Rebecca Gauthier, my associate, and Shari 09:01
14 Aberle, Optum's head of litigation. 09:01

15 MS. ABERLE: Good morning, your Honor. 09:01

16 THE COURT: Good morning. 09:01

17 The first thing I want to turn to is -- I 09:01
18 guess the first question that I have is to make 09:02
19 certain that everything in terms of the evidence 09:02
20 that the parties wish to present regarding the 09:02
21 issue of the class certification is what you have 09:02
22 submitted in writing. I don't see anybody here 09:02
23 who appears to be awaiting being sworn in to 09:02
24 testify, but I don't want to make that assumption. 09:02

25 So, Mr. Knott, let me turn to you first. 09:02

1 Is there any further evidence that the Plaintiff 09:02
2 seeks to present as part of the presentation for 09:02
3 class certification? 09:02

4 MR. KNOTT: No, your Honor. 09:02

5 THE COURT: And then with regard to the 09:02
6 Defendants, Mr. Sigler, Mr. Boone, will there be 09:02
7 any evidence presented by the Defendants? 09:02

8 MR. SIGLER: No, your Honor. 09:02

9 MR. BOONE: No, your Honor. 09:02

10 THE COURT: Mr. Knott, I think that 09:02
11 Mr. McDevitt threw you on the hot seat for this 09:03
12 one, so let me turn to you first. One thing that 09:03
13 I really didn't see addressed in the briefs by 09:03
14 anyone that seems to me to be a threshold issue, 09:03
15 particularly with the way things are structured in 09:03
16 this case, but I want to make sure that we're all 09:03
17 on the same page, and that is in light of the 09:03
18 language of Rule 23, do you agree that a class, 09:03
19 however the class is defined, has to be a class of 09:03
20 claimants? In other words, where it says that a 09:03
21 representative may -- one or more members of a 09:04
22 class may sue on behalf of all members, in other 09:04
23 words, all members, therefore, must have some 09:04
24 claim. Do you agree with that? 09:04

25 MR. KNOTT: I do, your Honor. 09:04

1 THE COURT: Okay. With that then, here's 09:04
2 what I don't understand yet with regard to the two 09:04
3 classes that you are wanting to define for 09:04
4 certification and that is what is their claim? 09:04
5 And let me refine that question so that it 09:04
6 hopefully is more understandable rather than less 09:04
7 understandable. 09:04

8 It seems to me that where you have this 09:04
9 situation where a payment by Optum exceeds the 09:04
10 contract amount, that you have potential plan 09:05
11 participants who fall into four different 09:05
12 categories. Category 1 is that all claims involve 09:05
13 a payment greater than the contract amount. 09:05
14 Category 2 is where all contract amounts exceed 09:05
15 all payments. Category 3 is where you have some 09:05
16 of each, but the degree of the amount by which 09:05
17 payments exceed contract amount is greater than 09:05
18 the contract amount exceeding payment. And then 09:05
19 the fourth category is the reverse, where contract 09:05
20 amount exceeding payment is greater than payment 09:05
21 exceeding contract amount. 09:05

22 So have I at least given you the 09:06
23 foundation here in a way that's understandable? 09:06

24 MR. KNOTT: I believe so, your Honor. 09:06

25 THE COURT: Okay. Of those four 09:06

1 categories, who are you saying is in your class? 09:06

2 MR. KNOTT: Who we're saying is in the 09:06
3 class is anyone who had a claim -- 09:06

4 THE COURT: No, I've given you the four 09:06
5 categories. What I want to hear from you is the 09:06
6 class consists of group 1 or the class consists of 09:06
7 groups 1 and 2 or the class consists of groups 1 09:06
8 and 4 or the class consists of all four groups. 09:06

9 MR. KNOTT: So I believe you -- I want to 09:06
10 make sure I've got the categories right. 09:06
11 Category 3 was the group where all of the 09:06
12 Optum-contracted amounts exceeded what the plan or 09:06
13 the member paid? 09:06

14 THE COURT: That was category 2. 09:06

15 MR. KNOTT: Okay, that's category 2. So 09:06
16 for an individual in that group where there was no 09:06
17 member or plan responsibility that exceeded what 09:07
18 the actual provider received, then there would be 09:07
19 no harm or loss, and those individuals would not 09:07
20 be in the proposed class. 09:07

21 THE COURT: But the other three groups you 09:07
22 are saying would be? 09:07

23 MR. KNOTT: Where there was a mix or where 09:07
24 there was any claim for a member in which the 09:07
25 Optum-contracted rate was lower than the combined 09:07

1 member in plan responsibility, that's the measure 09:07
2 that we'd propose to identify the class members. 09:07

3 THE COURT: With regard to group 4, and 09:07
4 that is where there's a mix of claims, there are 09:07
5 some where the payment exceeds the contract 09:07
6 amount, there are some where the contract amount 09:07
7 exceeds the payment, but group 4 is where the 09:07
8 contract amount exceeding the payment by more than 09:07
9 the payments exceeded the contract amount. How 09:08
10 are those people claimants? Because they have not 09:08
11 suffered a loss, they've actually -- it has enured 09:08
12 to their benefit, they're on the plus side of 09:08
13 ledger. How are they a claimant? 09:08

14 MR. KNOTT: So our position is those 09:08
15 people are still not on the plus side of the 09:08
16 ledger because they are paying, on the claims 09:08
17 where there was a difference, an administrative 09:08
18 fee that they should not have been required to pay 09:08
19 under their plan. And, so, it's to that claim 09:08
20 there was a breach of fiduciary duty, the member's 09:08
21 responsibility was incorrectly calculated, and we 09:08
22 believe there's a remedy for that under ERISA. 09:08

23 THE COURT: That doesn't -- at least 09:08
24 doesn't answer my question to my satisfaction. 09:08
25 How is somebody a claimant? In other words, if I 09:08

1 owe you \$10 but you owe me \$20, how am I a 09:08
2 claimant against you? 09:08

3 MR. KNOTT: Because the claim that is 09:09
4 being addressed in this litigation is the claim 09:09
5 where you improperly charged me for a claim. So, 09:09
6 for example, if I'm an attorney and I steal from 09:09
7 your trust account but I gave you a discount over 09:09
8 here, the client would still have a claim against 09:09
9 the attorney for the breach of fiduciary duty that 09:09
10 led to the loss. And maybe -- 09:09

11 THE COURT: Well, you said "led to the 09:09
12 loss," but if there isn't a net loss, how is there 09:09
13 a loss? 09:09

14 MR. KNOTT: Well, there's an injury on 09:09
15 that particular claim. Based on this Court's 09:09
16 prior ruling on the motion to dismiss, the Court 09:09
17 found that we had pleaded an injury based on the 09:09
18 fact that Ms. Peters paid more than she should 09:09
19 have on a given claim and the Defendants contend 09:09
20 that they should get an offset for claims where 09:09
21 maybe the relationship worked to the member's 09:09
22 benefit because the member would have paid more to 09:09
23 the actual provider than to the doctor, but that's 09:09
24 a damages issue, it's a relief issue, it's not one 09:10
25 that goes to whether the person has a viable ERISA 09:10

1 claim or not. 09:10

2 THE COURT: Well, you're now hitting on 09:10
3 what I see as the crux of the matter, but how -- 09:10
4 again, how is it a viable ERISA claim if the 09:10
5 claimant is on -- came out ahead? I mean, for any 09:10
6 kind of claim. 09:10

7 MR. KNOTT: So I point to, for example, 09:10
8 Judge Eagles' decision in the Clark v Duke 09:10
9 University case last year where the Defendants 09:10
10 made arguments that the plan had made imprudent 09:10
11 investments, but some of the proposed class 09:10
12 members had profited from those investments. And 09:10
13 the Court found that, because of the way the 09:10
14 relief requested was structured and because all 09:10
15 class members shared the same legal theory and 09:10
16 legal claim, and in this case, all class members, 09:10
17 including the ones in your category 4, would share 09:10
18 the same theory, the same claim that they were 09:11
19 improperly charged for administrative fees -- 09:11

20 THE COURT: Okay. I need to stop you for 09:11
21 a second because you seem to be conflating the 09:11
22 concept of the legal theory of a party, a 09:11
23 potential party, with a claim by that party. And 09:11
24 those seem to be two very different things. Just 09:11
25 because I can make an argument that, over here on 09:11

1 this one transaction, if you take it in a vacuum, 09:11
2 I have a loss does not mean that I have a claim if 09:11
3 I have a contractual relationship with another 09:11
4 party and I actually came out on the plus side of 09:11
5 that relationship. So how -- you know, before you 09:11
6 get to the theories that apply, you have to define 09:11
7 the class and the class has to consist of 09:11
8 claimants and what I'm having trouble getting over 09:12
9 is how is somebody a claimant if they came out 09:12
10 ahead. 09:12

11 MR. KNOTT: Well, your Honor, I don't 09:12
12 think anybody comes out ahead from having to pay 09:12
13 an administrative fee to a vendor that they 09:12
14 shouldn't have had to pay under their plan. 09:12
15 Whether there were other collateral benefits is 09:12
16 not an issue that deprives someone of a claim. 09:12

17 THE COURT: Well, you say "collateral 09:12
18 benefits," but it's a benefit that arises from 09:12
19 precisely the same arrangement that you're 09:12
20 complaining about. In other words, you have the 09:12
21 situation where, for procedure A, that Optum is 09:12
22 paid \$100 but has a contract rate with the 09:12
23 provider to pay 95. So Optum comes out ahead by 09:12
24 that \$5. For procedure B for that same patient, 09:12
25 that same plan participant, Optum is paid \$100 but 09:12

1 has to pay the contract provider 105. Therefore, 09:12
2 by exactly the same process, exactly the same 09:13
3 arrangement, exactly the same contracts, both on 09:13
4 the plan side and on the provider side, Optum 09:13
5 gains \$5 on one, loses \$5 on the other, there's no 09:13
6 loss to anybody. Everybody comes out exactly 09:13
7 even. How is anybody a claimant under those 09:13
8 circumstances? 09:13

9 In other words, you keep wanting to 09:13
10 separate those and say, well, you only count A, 09:13
11 you don't count B. On what basis? If the 09:13
12 claim -- you have to be a claimant, you have to be 09:13
13 able to say for whatever small piece, I, as a 09:13
14 member of this plan, have lost money to Optum to 09:13
15 be a claimant. And that proverbial participant in 09:13
16 the plan hasn't lost anything, he or she has come 09:13
17 ahead, haven't they? 09:14

18 MR. KNOTT: Your Honor, again, I think I 09:14
19 just have a fundamental disagreement with whether 09:14
20 ERISA would allow that person who has paid a \$5 09:14
21 improper fee to have a claim based on the injury, 09:14
22 the right under ERISA to challenge any act that 09:14
23 violates the terms of their plan. 09:14

24 THE COURT: Well, then let me stop you on 09:14
25 that because that's where I thought you were going 09:14

1 next. Do you have any case law to back that up in 09:14
2 a situation where -- let's leave the class action 09:14
3 part of this aside for a moment. Just where a 09:14
4 plan participant says, plan administrator, the way 09:14
5 you do things, sometimes you cause me to lose a 09:14
6 little bit of money and sometimes you cause me to 09:14
7 gain money. And even though I've come out ahead, 09:14
8 I get to recover from you those losses by treating 09:14
9 those in a vacuum and because that's a violation 09:14
10 of ERISA. Do you have any case law that backs up 09:15
11 that theory? 09:15

12 MR. KNOTT: Your Honor, I would just point 09:15
13 to any case where a Plaintiff, for example, 09:15
14 challenges a benefits denial, where the Plaintiff 09:15
15 only has to establish that benefits were wrongly 09:15
16 denied on one claim and doesn't have to establish 09:15
17 or refute a Defendant showing, well, maybe we 09:15
18 would have approved this other claim over here 09:15
19 that you didn't have approved. There's not -- you 09:15
20 don't take each claim and smash them together; 09:15
21 each claim is a separate transaction. 09:15

22 And on your example with the \$105 here and 09:15
23 the \$95 here, on the claim where there's the \$105 09:15
24 charge, there's been an improper fee for the other 09:15
25 claim, ERISA hasn't been violated because the 09:15

1 member hasn't been required to pay more than they 09:15
2 were obligated to pay under the plan. And the 09:15
3 Defendant may take the position, well, we didn't 09:15
4 charge enough for that particular claim, but we're 09:15
5 not seeking to have people pay that money back. 09:16
6 It's similar to the Clark case where no one was 09:16
7 seeking to have class members pay back profits 09:16
8 that they received from imprudent investments, but 09:16
9 were still challenging the improper fees that were 09:16
10 charged on the investment decisions. 09:16

11 THE COURT: Well, let me hear from the 09:16
12 other side on this. Mr. Sigler, Mr. Boone, I 09:16
13 don't know which one of you wants to go first. 09:16

14 MR. SIGLER: I can go first, your Honor. 09:16

15 The issue, I think, your Honor is 09:16
16 identifying has a few different facets to it. 09:16
17 Certainly, it is a Rule 23 issue. I think the 09:16
18 Supreme Court made that clear in Duke's, that 09:16
19 there needs to be a common injury, which I think 09:16
20 is getting to a similar issue to the one your 09:16
21 Honor is identifying. 09:16

22 In addition to that -- 09:16

23 THE COURT: Well, tell me if you view this 09:16
24 differently. I see this as the threshold issue 09:16
25 because until we can identify who is and who is 09:16

1 not a claimant, we can't begin to define a class, 09:17
2 we can't begin to define what the commonality is, 09:17
3 we can't begin to determine whether there's any 09:17
4 ascertainability of the class. Figuring out who 09:17
5 is and who is not a claimant is -- it has to be 09:17
6 step one of the process, doesn't it? 09:17

7 MR. SIGLER: Absolutely, your Honor. And 09:17
8 part and parcel with that, my only point is that 09:17
9 what Duke says is that the class, once you've 09:17
10 figured out who those claimants are, needs to 09:17
11 include people with a common injury, which I think 09:17
12 if you end up in a situation where you're letting 09:17
13 people into the class who aren't true claimants, 09:17
14 you'll end up with the situation identified in 09:17
15 Duke's, where there isn't a common injury binding 09:17
16 the class together. 09:17

17 I think that the hypotheticals that 09:17
18 counsel was identifying, if I understood them 09:17
19 correctly, involve situations where you've got 09:17
20 separate acts resulting in different results for a 09:17
21 particular person, and that's not, as I understand 09:17
22 it, the issue here. The Plaintiffs are 09:17
23 challenging this relationship, the way the 09:18
24 relationship was established, the structure of the 09:18
25 relationship, and if that's the focus of their 09:18

1 claim, if that's the alleged breach, then it would 09:18
2 make no sense to look at category 4 any 09:18
3 differently than category 1, 2 or 3 in terms of 09:18
4 how to calculate their benefits. You wouldn't 09:18
5 calculate the benefits one way on certain claims 09:18
6 and another way on other claims. And if the focus 09:18
7 is on the but-for world where we're calculating 09:18
8 rates differently, category 4 is a category of 09:18
9 people who aren't injured by the alleged breach 09:18
10 that they are challenging. 09:18

11 And, finally, your Honor -- 09:18

12 THE COURT: Let me stop you for a second 09:18
13 because Mr. Knott argues that even outside of the 09:18
14 class action area, that, under ERISA, where you 09:18
15 have a plan participants who, because of a series 09:18
16 of claims, has been harmed by the way the claims 09:18
17 have been handled as to claims 1 and 2 but has 09:19
18 benefitted as a result of the way that same 09:19
19 process handles claims 3 and 4, Mr. Knott argues 09:19
20 that the law is that the claimant can isolate 09:19
21 claims 1 and 2 and recover for the loss on those 09:19
22 irrespective of any gain from that method being 09:19
23 used that enured to the claimant's benefit. Is he 09:19
24 right about that? 09:19

25 MR. SIGLER: Absolutely not, your Honor. 09:19

1 THE COURT: Do you have any case law to 09:19
2 back up your side? 09:19

3 MR. SIGLER: I would point to the Pender 09:19
4 decision in 2018 out of the Fourth Circuit and the 09:19
5 Plasterers decision in 2011 out of the Fourth 09:19
6 Circuit in which the Fourth Circuit made very 09:19
7 clear that you need to apply a but-for analysis in 09:19
8 determining whether someone is injured or not, 09:19
9 whether they stand to recover under a breach of 09:19
10 fiduciary duty claim. And if the but-for analysis 09:19
11 takes you back to a decision and that decision is 09:20
12 applied to the Plaintiff's experience and the 09:20
13 Plaintiff comes out behind under the Plaintiff's 09:20
14 theory, there is no injury. 09:20

15 And, here, we've got them pointing back to 09:20
16 a decision that would have brought about category 09:20
17 4 people who had some claims in one bucket and 09:20
18 some people in another, and it doesn't make sense 09:20
19 under those authorities to treat those claims 09:20
20 differently when they are rooted in the same 09:20
21 fiduciary decision that they're challenging. 09:20

22 I heard them mention the Clark case; if I 09:20
23 could briefly respond to that case. That's a 09:20
24 District Court decision, and as I understand the 09:20
25 analysis in that case, the judge was pointing to 09:20

1 the fact -- 09:20

2 THE COURT: To make sure I understand, 09:20
3 you're talking about -- that's the same as the 09:20
4 Duke University case? 09:20

5 MR. SIGLER: Yes, your Honor. Clark 09:20
6 versus Duke University. It involved a single 09:20
7 plan, the Duke University plan, and some decisions 09:20
8 about how to allocate assets under that retirement 09:20
9 plan. As I understand what the Court was saying 09:20
10 there is that the Defendant had identified 09:20
11 hypothetical differences in outcomes, hypothetical 09:21
12 conflicts, and she didn't think that those issues, 09:21
13 those hypothetical issues rose to the level that 09:21
14 they would require denial of class certification. 09:21

15 Here, we've got specific concrete examples 09:21
16 of people in category 4, Ms. Peters herself is in 09:21
17 that category. And, of course, from a 09:21
18 class-certification perspective, it's also 09:21
19 important to note that figuring out who is in that 09:21
20 category versus the other categories is itself a 09:21
21 claim-by-claim person-by-person analysis. 09:21

22 THE COURT: Okay. Mr. Boone, do you have 09:21
23 something you want to add to that issue? 09:21

24 MR. BOONE: Yes, your Honor. I'll try not 09:21
25 to repeat what Mr. Sigler just said to you. 09:21

1 You're exactly right, the person who, 09:21
2 under the Aetna-Optum contract, is better off or 09:21
3 in the same position otherwise than they would 09:21
4 have been has no legal claim, they've suffered no 09:21
5 injury, and sorting that out would require 09:21
6 thousands of individual inquires. 09:21

7 And I guess the next point that I would 09:21
8 make is that we're not talking about benefits 09:22
9 claims here. Mr. Knott, in his briefing, doesn't 09:22
10 really talk about the elements to his claims 09:22
11 because I think he knows that if you talk about 09:22
12 the elements of claims, that Rule 23 is not going 09:22
13 to favor his position. 09:22

14 The third point that I would make is that 09:22
15 Aetna members don't pay Optum, they pay Optum's 09:22
16 downstream providers. And, so, Mr. Knott talks 09:22
17 that Aetna members are paying Optum directly. 09:22
18 That doesn't happen, they are paying Aetna's 09:22
19 downstream providers; Optum doesn't have members. 09:22

20 And the fourth thing that I would say is 09:22
21 that Mr. Knott is not seeking certification of a 09:22
22 fiduciary theory against Optum. We're here for 09:22
23 Optum on a narrow unpleaded claim of non-fiduciary 09:22
24 liability which raises its own individual issues 09:22
25 that we can talk about later. 09:22

1 THE COURT: Mr. Knott, I'll turn back to 09:23
2 you. For instance, Mr. Sigler refers the Court 09:23
3 back to Pender and Plasterers as refuting your 09:23
4 view of who is and who is not a claimant under 09:23
5 ERISA. What do you say in response to that? 09:23

6 MR. KNOTT: What I say is that Plasterers 09:23
7 and Pender recognize that there has to be some 09:23
8 sort of loss, but, here, we can establish a loss 09:23
9 by virtue of the practice that violated the plan, 09:23
10 which was charging members more than they were 09:23
11 required to pay the downstream providers. As to 09:23
12 the other claims in category 4, there's not a loss 09:23
13 because members weren't required to pay more than 09:23
14 they otherwise were required to pay. 09:23

15 THE COURT: But the loss that you're 09:23
16 claiming arises from a system of administering the 09:23
17 claims. In category 4, the application of that 09:24
18 system for administering the claims enured to the 09:24
19 benefit of the person you're wanting to include in 09:24
20 the class. So how -- again, how is that a 09:24
21 claimant? I'm -- apparently, I'm being very dense 09:24
22 on this because I'm having a lot of trouble 09:24
23 grasping your argument on how somebody who 09:24
24 actually, because of the application of the 09:24
25 practice in question, has benefitted, unlike what 09:24

1 you have in the Duke University case, how is that
2 person a claimant? Because in any other context,
3 they are not. The person who came out ahead does
4 not have a possibility of suing.

5 If you and I have a contractual
6 relationship that involves even a series of
7 transactions and I came out ahead and I get ticked
8 off with you and I try to sue you for breach, I
9 don't have a loss. How do I have -- you'd file a
10 Rule 11 motion against me, wouldn't you?

11 MR. KNOTT: I think two points on this.
12 First of all, this is a common issue for a lot of
13 class members and, actually, Ms. Peters does not
14 fall in category 4. If you add up the claims
15 where the actual provider would have collected
16 more but for Optum, the Optum rate, in other
17 words, the claims where the actual provider's
18 charge exceeded the Optum rate, I think she may
19 have one or two of those, but in the aggregate,
20 her claims, typically, the Optum rate greatly
21 exceeded what the actual provider collected.

22 THE COURT: But with Ms. Peters, wasn't it
23 if you break it down by year, there's at least one
24 year where she does come out ahead, but if you
25 aggregate all of the years involved together, that

1 she comes out somewhat behind? 09:26

2 MR. KNOTT: Well, so their position as to 09:26
3 the one particular year in question involves 09:26
4 deductible claims which, again, is a common issue. 09:26
5 Every member has deductibles and their position is 09:26
6 that, because of the way they treated deductibles, 09:26
7 Ms. Peters and thousands of other class members 09:26
8 wouldn't have an injury or a loss. And, again, 09:26
9 that's a common issue that they would bring up in 09:26
10 any case where any of these absent class members 09:26
11 sued them, but their theory is that Ms. Peters 09:26
12 actually paid on deductible claims exactly what 09:26
13 she should have paid, which was the actual 09:26
14 provider's charge, but Aetna, for whatever reason 09:26
15 that was part of the cover-up, wrote off the 09:26
16 remainder which they applied to the deductible 09:26
17 because there wasn't a means for them to go out 09:26
18 and collect that money from the member without the 09:26
19 member figuring out what was going on, that they 09:26
20 were being charged for these administrative fees. 09:26
21 And, so, they take the position that that is 09:27
22 somehow a benefit that eliminates the injury from 09:27
23 actually being charged the improper fees on later 09:27
24 claims. 09:27

25 THE COURT: I have to admit I did not 09:27

1 follow that argument. If you want to try that 09:27
2 again, maybe I'll grasp it this time. 09:27

3 MR. KNOTT: Sure. So I think the claims 09:27
4 generally fall into four categories, there are 09:27
5 deductible claims, there are co-insurance claims, 09:27
6 there are copay claims where you owe a fixed copay 09:27
7 every time you go to the doctor and then there are 09:27
8 claims where the plan for the entirety of the fee. 09:27

9 And, so, in the deductible -- 09:27

10 THE COURT: What's the fourth? 09:27

11 MR. KNOTT: So -- 09:27

12 THE COURT: The fourth category, I didn't 09:27
13 understand what you said. 09:27

14 MR. KNOTT: So after the member has 09:27
15 exhausted whatever they are required to pay under 09:27
16 the plan, then the plan pays 100 percent of the 09:27
17 charges. So, in that scenario to Mr. Boone's 09:27
18 point, the plan would be paying Optum's entire fee 09:28
19 in violation of the plan. 09:28

20 For the deductible claims, how to handle 09:28
21 them was the actual provider would collect what 09:28
22 they were supposed to collect from the member, so, 09:28
23 say, \$40. That was what the negotiated charge 09:28
24 was, that was what the member was supposed to pay. 09:28
25 Aetna still decided to apply the Optum rate, 09:28

1 which, for example, would be \$70.89, to the 09:28
2 patient's deductible, but Optum has basically 09:28
3 written that off and decided not to collect it, 09:28
4 which is pretty unusual in the insurance context. 09:28
5 And now Aetna and Optum take the position that 09:28
6 because they wrote off the deductible and didn't 09:28
7 seek to collect it from the member, that that 09:28
8 somehow is a benefit to the member, but you have 09:28
9 to ask, why did they do that? Why didn't they try 09:28
10 to collect the deductibles? Because, if they did, 09:29
11 the member would figure out what was going on and 09:29
12 they wouldn't be able to dip into the member's 09:29
13 payment and the plan's payment on the co-insurance 09:29
14 claims where the member owes a percentage of the 09:29
15 negotiated charge. 09:29

16 So, for example, the member would owe 09:29
17 20 percent of \$70.89 and the plan would owe the 09:29
18 rest. In that scenario, Optum told the doctor to 09:29
19 collect 20 percent of \$70.89 and the plan paid the 09:29
20 rest of that amount. Optum kept, for example, in 09:29
21 that scenario, \$56.71 and then paid \$26 to the 09:29
22 plan -- or to the provider, to the actual 09:29
23 provider, and kept the rest. And, so, the 09:29
24 Defendants' position is that because of the way 09:29
25 they treated the deductibles where, again, the 09:29

1 member was required to pay what they were supposed 09:30
2 to pay. So our position is that's not a claim 09:30
3 where there was a loss because the member didn't 09:30
4 pay any more than they were supposed to, but the 09:30
5 Defendants say, well, we gave this credit, this 09:30
6 deceptive credit because, otherwise, we couldn't 09:30
7 have carried out the scheme as to the other 09:30
8 claims, and that's somehow a benefit that 09:30
9 eliminates the fact that we charged you improperly 09:30
10 on the other claims. 09:30

11 THE COURT: But it is a benefit. The plan 09:30
12 participant didn't pay that -- you didn't use very 09:30
13 round numbers, so it makes it very hard, but 09:30
14 whatever that 20 percent or whatever, that plan 09:30
15 participant didn't pay it, therefore, the plan 09:30
16 participant benefitted to that amount, right? 09:30

17 MR. KNOTT: It is an economic benefit, 09:30
18 your Honor. That is true. If you don't have to 09:30
19 pay your whole deductible, that's a benefit. But 09:30
20 it is not one that eliminates the harm and the 09:30
21 unjust gain on the other claims. 09:30

22 THE COURT: Why doesn't it offset? 09:30

23 MR. KNOTT: They can argue for an offset, 09:31
24 but, again, that's a common issue and that's a 09:31
25 common merits issue. 09:31

1 THE COURT: But, again, if it offsets and 09:31
2 that offset is greater than any loss from the 09:31
3 manner in which these claims are processed, how is 09:31
4 that participant a claimant? 09:31

5 MR. KNOTT: Well, I don't agree that there 09:31
6 would be an offset, your Honor, because it's like 09:31
7 a doctor who says I didn't collect this other 09:31
8 charge and, so, maybe I overcharged you for this 09:31
9 other claim, but I didn't send you a bill for this 09:31
10 other charge, so you have no loss on the improper 09:31
11 charge. That's just -- that's not the way that 09:31
12 ERISA works. 09:31

13 And the deductible write-off is part of 09:31
14 the scheme that allows them to get the unjust 09:31
15 gains that are at issue here. Again, Aetna is a 09:31
16 fiduciary. It's supposed to follow the plan, and 09:31
17 when it doesn't follow the plans and members are 09:31
18 forced to pay more on a benefit claim as a result, 09:32
19 that is a breach and it's a breach that's 09:32
20 remediable under ERISA. 09:32

21 THE COURT: You say that that's not an 09:32
22 offset, in other words, that the Defendants do not 09:32
23 get to offset that benefit even though you 09:32
24 acknowledge the benefit to the participant. You 09:32
25 say that there can't be an offset there, but 09:32

1 that's an issue that's not common to all your 09:32
2 class members, that's an entirely separate 09:32
3 calculation and -- calculation that has to be done 09:32
4 and issue that has to be resolved only with regard 09:32
5 to categories 3 and 4, the way I've defined it at 09:32
6 the beginning, right? 09:32

7 MR. KNOTT: Well, it's an issue that would 09:32
8 apply to thousands of class members. It's not 09:32
9 unique or individualized to Ms. Peters. And the 09:32
10 question can be answered with the Defendants' own 09:32
11 data, so there is not a complicated individualized 09:32
12 inquiry. 09:32

13 THE COURT: Let's not make it more 09:32
14 complicated than we need to for each individual 09:33
15 question because my point is that is an issue that 09:33
16 is not common to all members of the class as you 09:33
17 intend to define it, correct? 09:33

18 MR. KNOTT: I'd expect that most, if not 09:33
19 all, class members would have deductibles and they 09:33
20 have deductible claims falling within that, but I 09:33
21 don't have a specific answer as to whether there 09:33
22 might be some members in our proposed class that 09:33
23 would not have had a deductible claim. 09:33

24 THE COURT: But then with regard to 09:33
25 those -- if there is a determination that an 09:33

1 offset is allowed, in other words, that the 09:33
2 Defendants can make this calculation on an offset 09:33
3 basis, then it's a matter of discerning who is in 09:33
4 the category 3 box as opposed to the category 4 09:33
5 box, correct? 09:33

6 MR. KNOTT: Yes, and that's something that 09:34
7 can be addressed on common evidence using common 09:34
8 data. 09:34

9 THE COURT: How can that be addressed 09:34
10 using common evidence using common data when you 09:34
11 have to take each individual plan participant and 09:34
12 determine which box they are in? Even if I define 09:34
13 the class as you are suggesting that I should, we 09:34
14 still have group 1, group 3 and group 4. And, 09:34
15 ultimately, because of these issues that we're 09:34
16 talking about now, first, we have to separate out 09:34
17 groups 3 and 4 from group 1, but then we have to 09:34
18 separate out group 3 from group 4. How is that 09:34
19 not an individualized analysis to figure out who 09:34
20 is in and who is not in each of these groups? 09:34

21 MR. KNOTT: Your Honor, I want to be 09:34
22 careful because I'm not accepting the proposition 09:34
23 that we have to conduct that sort of analysis in 09:34
24 order to certify that class because -- 09:34

25 THE COURT: How can you avoid it? 09:35

1 MR. KNOTT: Because we have identified a 09:35
2 group of class members, each of which were 09:35
3 subjected to improper charges that violated the 09:35
4 plan, and these arguments about other benefits on 09:35
5 other claims where either -- 09:35

6 THE COURT: Well, I mean, isn't that 09:35
7 essentially saying we win on the issue that you're 09:35
8 talking about right now, dividing group 3 from 09:35
9 group 4, if we ignore that issue? I mean, isn't 09:35
10 that essentially what you're saying? You're 09:35
11 saying we can certify the class so long as you 09:35
12 ignore that issue. 09:35

13 MR. KNOTT: What I'm saying is that the 09:35
14 class can be certified. To the extent they have 09:35
15 arguments about offset for damages, those go to 09:35
16 the ultimate relief that can be recovered, not to 09:35
17 whether someone is a proper part of class. And we 09:35
18 have cited antitrust cases, Cardizem, Laumann, 09:35
19 where there actually is this holistic economic 09:35
20 analysis required and those Courts rejected 09:35
21 arguments about other attendant economic benefits 09:36
22 depriving the class of certification. The Courts 09:36
23 have said those are -- those offset injuries, 09:36
24 those are damages issues that go to the relief, 09:36
25 they don't go to whether the class can properly be 09:36

1 certified. 09:36

2 THE COURT: But none of those had to do 09:36
3 with benefits that arise from the application of 09:36
4 exactly the same process that gives rise to the 09:36
5 claim, right? Do you have any case that says that 09:36
6 by setting up a particular arrangement of how 09:36
7 claims -- or how any type of claim is being 09:36
8 handled, that in some way it benefits and in some 09:36
9 way it harms the putative class members, that you 09:36
10 can ignore the portion of that process that gives 09:36
11 rise to the gain? Do you have any cases that say 09:36
12 that because, in reading the briefs, I never saw 09:37
13 that anywhere. 09:37

14 MR. KNOTT: Again, I would point to 09:37
15 Laumann, I'd point to Cardizem, I'd point to Clark 09:37
16 where, again, the process at issue there was an 09:37
17 antitrust violation. You violated the antitrust 09:37
18 laws, you deprived us of a competitive 09:37
19 environment. And the Defendant said, well, that 09:37
20 actually benefitted some people in some way. And 09:37
21 the Court said that's an injury or that's a damage 09:37
22 argument, that's not an argument that's unique to 09:37
23 any given class member that deprives the class of 09:37
24 certification. 09:37

25 And, your Honor, I'd like to make one more 09:37

1 point on the deductible claims, if I could. 09:37

2 THE COURT: You may. 09:37

3 MR. KNOTT: Which is that the Defendants 09:37
4 were actually inconsistent in how they handled 09:37
5 deductible claims versus how they handled 09:37
6 co-insurance claims or plans where the -- claims 09:37
7 where the plans paid the full amount because 09:37
8 members were held financially responsible for the 09:38
9 Optum rate under co-insurance claims and the plans 09:38
10 were held responsible for the Optum rate of the 09:38
11 claims where the plans paid the entire amount. 09:38
12 For deductible claims, the Defendants' position is 09:38
13 that the members weren't actually financially 09:38
14 responsible for the full Optum rate, and that's 09:38
15 inconsistent. That, to me, it is another example 09:38
16 of how they breached by picking and choosing when 09:38
17 they want to apply their own rules. 09:38

18 THE COURT: You're going to have to go 09:38
19 through that one again because, again, I did not 09:38
20 follow the argument that you made. 09:38

21 MR. KNOTT: Sure. So the Defendants' 09:38
22 position is that when a member had a deductible 09:38
23 claim, the member was only financially responsible 09:38
24 for the actual provider's charge, or for their 09:38
25 percentage, which is 100 percent in deductible 09:38

1 claims of the actual provider's charge. The EOB 09:38
2 says something different, it said you owe the full 09:39
3 charge, but that wasn't true. 09:39

4 Then we get to the co-insurance plans. 09:39
5 The Defendants' position is that the members are 09:39
6 responsible for their percentage, 20 percent of 09:39
7 the Optum charge, not the actual provider's 09:39
8 charge. So they are actually applying a different 09:39
9 rule. 09:39

10 THE COURT: There's an inconsistency to 09:39
11 the Defendants' argument. 09:39

12 MR. KNOTT: There absolutely is. 09:39

13 THE COURT: How does -- why does that make 09:39
14 any difference with regard to the question of 09:39
15 class certification, particularly with regard to 09:39
16 this question of who is -- who is and who is not a 09:39
17 claimant? 09:39

18 MR. KNOTT: Because they applied that 09:39
19 inconsistency to every member of the class who 09:39
20 owed co-insurance and to every plan that paid. 09:39
21 And, remember, that a participant or beneficiary 09:39
22 can bring a claim on behalf of the plan for the 09:39
23 Defendants' breaches of fiduciary duty, not just 09:39
24 limited to bringing a claim on their own behalf. 09:39

25 THE COURT: But, again, as to class 09:40

1 certification and determining who is and who is 09:40
2 not a claimant, why does that matter? I mean, 09:40
3 let's say I accept your argument that there is an 09:40
4 inconsistency to the Defendants' position 09:40
5 depending on what kind of claim. As for why we're 09:40
6 here today, so what? 09:40

7 MR. KNOTT: Well, because our position is 09:40
8 that if they followed that rule for the deductible 09:40
9 claims, that you were not supposed to pay anything 09:40
10 but what you were paying to the actual provider, 09:40
11 that they should have followed that same rule with 09:40
12 the co-insurance claims and with the claims where 09:40
13 the plan was paying. 09:40

14 THE COURT: And assume that they did. As 09:40
15 to why we're here today, so what? 09:40

16 MR. KNOTT: Assume that they did take that 09:40
17 inconsistent position? 09:40

18 THE COURT: No, assuming that you could 09:40
19 convince them to be consistent, what difference 09:40
20 would it make with regard to class certification, 09:41
21 particularly on this threshold issue of who is and 09:41
22 who is not a claimant? 09:41

23 MR. KNOTT: So if we could establish that 09:41
24 there was a legal violation when they were 09:41
25 inconsistent as to everybody who paid under the 09:41

1 old rule, then every class member would have a 09:41
2 claim based on that. And that's the claim we're 09:41
3 asserting, that's the common -- 09:41

4 THE COURT: How is it -- I mean, you know 09:41
5 your case a lot better than I know your case, so 09:41
6 you're going to have to teach me enough of your 09:41
7 case to where any of this makes sense. And that's 09:41
8 probably one of the reasons why you ultimately 09:41
9 probably don't want this in front of a jury, 09:41
10 because you're never going to be able to teach a 09:41
11 jury about this case. But the thing is you say 09:41
12 that, oh, well, if they can't be inconsistent, 09:41
13 then everybody is a claimant. How do I tell that 09:41
14 from this record? How do I know that everybody 09:41
15 who participates in this plan miraculously becomes 09:41
16 a claimant, that they miraculously have a loss if 09:42
17 calculated without that inconsistency? Where do 09:42
18 you get that, how do I know that? 09:42

19 MR. KNOTT: Because we have put in 09:42
20 evidence from our expert that is, based on the 09:42
21 Defendants' claims data that shows that, as 09:42
22 to everyone the expert identified paid subject to 09:42
23 that inconsistent rule. They were charged subject 09:42
24 to that inconsistent rule. 09:42

25 THE COURT: They were charged subject to 09:42

1 that inconsistent rule, but you were saying
2 yourself earlier that you count only the losses
3 and you don't count the benefits that accrue from
4 that -- applying that same process to the same
5 plan participants. So, again, looking at this
6 issue in a vacuum, this claim of yours that the
7 Defendants are being inconsistent, as to the
8 question of who is or who is not a claimant, what
9 difference does it make?

10 MR. KNOTT: So I think I want to tackle
11 sort of two buckets of claims. One is the
12 deductible claim where we've talked about the
13 inconsistent practice and then the other are the
14 set where I think Optum has pointed to, in a
15 minority of claims, sometimes Optum agreed to pay
16 more to the actual doctor than it took in. For
17 that second bucket of claims, we can identify
18 those claims, and if those claims were to outweigh
19 the claims where Optum took in more than it paid
20 out, we can identify those people. We can
21 identify the people in category 4.

22 THE COURT: But then that would be -- that
23 would require an individualized or particularized
24 analysis of the plan participants which, as the
25 Fourth Circuit has said, that eliminates

1 commonality, you don't have commonality then. 09:43

2 MR. KNOTT: It's not an analysis that 09:43
3 requires individual assessment of each claimant's 09:44
4 personal circumstances, it's based on the claims 09:44
5 data that's common evidence. I point to the Ward 09:44
6 case, for example, where the Fourth Circuit 09:44
7 approved a method of assessing damages that relied 09:44
8 on claims data. And, yes, each data line is 09:44
9 specific to a particular participant, but you can 09:44
10 use the data to answer the question. You don't 09:44
11 have to do -- you know, call every class member in 09:44
12 to say, well, what did you pay on this claim or 09:44
13 that claim; the answer is there and it's in the 09:44
14 data. 09:44

15 THE COURT: But with -- here's the problem 09:44
16 I'm having in understanding the argument that 09:44
17 you're making. In the -- it's the Fourth 09:44
18 Circuit's case, I think it's EQT, where they -- it 09:44
19 doesn't have to do with insurance claims, it has 09:44
20 to do with this several purported classes of 09:44
21 property owners, and then there was a question of 09:45
22 whether or not they had a claim to the methane 09:45
23 rights on their property. And it sounds like 09:45
24 there, the ones who were seeking class 09:45
25 certification were making an argument that, as far 09:45

1 as I can tell, is identical to yours. You look at 09:45
2 these as a group. As a group, there are so many 09:45
3 of these that where there is -- there are methane 09:45
4 rights on the properties, therefore, we go forward 09:45
5 with the class, we define it as all these property 09:45
6 owners and we will separate the sheep from the 09:45
7 goats later. And the Fourth Circuit says you 09:45
8 can't do that, you have to figure out first who 09:45
9 the claimants are, and if you can't do that, then 09:45
10 you don't have commonality. And if you have to go 09:45
11 through to figure out, well, this one has methane 09:45
12 rights and that one does not and this one does and 09:45
13 this one does, but number 5 does not, then you 09:46
14 don't have a class action. 09:46

15 How is this any different? Because, here, 09:46
16 it seems to me that particularly with these four 09:46
17 categories that I've talked about, and you've said 09:46
18 you're excluding group 2, but we're still talking 09:46
19 about groups 1, 3 and 4, but the Defendants are 09:46
20 saying group 4 can't be in the class and, 09:46
21 therefore, to separate out group 4, you have to do 09:46
22 exactly that same sort of particularized analysis 09:46
23 of each individual participant just like the Court 09:46
24 had in EQT. How is your situation any different 09:46
25 from that? 09:46

1 MR. KNOTT: For a couple of reasons. In 09:46
2 EQT, identification of the class members who had a 09:46
3 claim depended on complicated deeding laws and 09:46
4 implied trusts over the methane in the ground. 09:46
5 And, here, all class members are relying on ERISA, 09:47
6 all class members are relying on plans that were 09:47
7 materially the same. So that -- 09:47

8 THE COURT: But each of them has a 09:47
9 different group of claims that were made that 09:47
10 would either form or not form the basis for a 09:47
11 claim. So it's that claims information regarding 09:47
12 each participant that's just like the deed in EQT, 09:47
13 isn't it? 09:47

14 MR. KNOTT: I disagree with that, your 09:47
15 Honor, because I think you would have this 09:47
16 scenario in every single ERISA class action. To 09:47
17 figure out whether somebody is in the class, you 09:47
18 have to look at the data and see if they have a 09:47
19 claim, a benefits claim, a claim that's been 09:47
20 adjudicated. And, here, again, we can do it 09:47
21 looking at the data to figure out who is in, who 09:47
22 is out. If you have an objective measure, the 09:47
23 data permits you to ascertain who is in the class 09:47
24 based on the legal parameters that define what 09:47
25 class is. 09:48

1 THE COURT: How can you do that without 09:48
2 looking at each individual participant's claim 09:48
3 ledger? You keep saying you can discern it from 09:48
4 the data, all you have to do is look at the data. 09:48
5 But isn't the data the claim -- my term, claim 09:48
6 ledger, the list of claims by each individual 09:48
7 participant, isn't that what you're talking about? 09:48

8 MR. KNOTT: Yes, but, again, you'd have to 09:48
9 do that in any ERISA case involving claims for 09:48
10 thousands of class members. And they exist, they 09:48
11 are out there. Again, you have to look at the 09:48
12 data to figure out who is in the class, but you 09:48
13 don't have to conduct an individualized inquiry 09:48
14 where you have to collect individual evidence from 09:48
15 every person and hear their story, hear what 09:48
16 happened to them, and there's no oral 09:48
17 representations at issue, so -- 09:48

18 THE COURT: There wasn't in EQT, either. 09:48
19 You just have to look at, rather than the claims 09:48
20 ledger, you have to look at the deed, you have to 09:48
21 analyze each deed. How is this different? 09:49

22 MR. KNOTT: Well, actually, the difference 09:49
23 is that, in EQT, the Court actually didn't say you 09:49
24 can't possibly certify this class, it just said 09:49
25 you have to do a more rigorous analysis to figure 09:49

1 out whether these people fall into the buckets 09:49
2 you're talking about. And what I'm saying is that 09:49
3 that sort of analysis, the complicated analysis of 09:49
4 deeds and deeding history and all that, that's not 09:49
5 an issue here. We have a single law, ERISA. We 09:49
6 have a common practice that we know applied to 09:49
7 every class member. They charged -- 09:49

8 THE COURT: But each participant has a 09:49
9 different claims ledger and that's the equivalent 09:49
10 of the deeds in EQT. Right? 09:49

11 MR. KNOTT: I disagree with that because 09:49
12 claimants may have a certain number of claims, 09:49
13 some may have 10, some may have one, but we can 09:49
14 figure out just based on the data who had a claim 09:49
15 that was subjected to this inconsistent rule. And 09:49
16 that is not an individualized inquiry that runs 09:49
17 afoul of Rule 23 because it's based on common 09:50
18 evidence. Again, the data, it's their own data, 09:50
19 it's not specific to any class member. The data 09:50
20 is there for Ms. Peters, it's there for every 09:50
21 other absent class member. 09:50

22 THE COURT: But only if I adopt your view 09:50
23 that any loss by a plan participant gives rise to 09:50
24 inclusion within the class, in other words, 09:50
25 classes 1, 3 and 4 are really all just one class 09:50

1 because any benefit that enured to the participant 09:50
2 from the administration of the plans according to 09:50
3 this process don't matter. I have to adopt that 09:50
4 view. Your entire class certification theory 09:50
5 rests on that one point, doesn't it? 09:50

6 MR. KNOTT: No. And here's why: You have 09:50
7 to analyze the data to figure out who is under the 09:51
8 class -- who is in the class on my theory. You 09:51
9 can just as easily analyze the class under a 09:51
10 theory where if you had a set of claims over here 09:51
11 that exceeded -- where the Optum rate was lower 09:51
12 than the actual provider collected and that 09:51
13 outweighed the claims where Optum took in more, 09:51
14 and you said that person is not going to be in the 09:51
15 class, you can look at the data, you can crunch 09:51
16 the numbers and that person is out. It's the same 09:51
17 analysis. You're looking at the same data, the 09:51
18 same information, the same common information. 09:51

19 THE COURT: Okay. Well, let me hear from 09:51
20 either Mr. Sigler or Mr. Boone in response. 09:51

21 Mr. Sigler, I'll hear from you first. 09:51

22 MR. SIGLER: Of course, your Honor. So I 09:51
23 wanted to point out that Plaintiff's counsel keeps 09:51
24 saying that could figure out who is in which 09:51
25 category by looking at the data. Their expert 09:51

1 actually hasn't done that. 09:51

2 THE COURT: Well, let me stop for a second 09:52
3 because this is one thing that I'm still unclear 09:52
4 about. When we make this reference to the data, 09:52
5 Mr. Knott keeps referring to the data, if I 09:52
6 understand correctly, ultimately, he's saying the 09:52
7 data is the particular claims that pertain to each 09:52
8 individual participant. It's not like there is 09:52
9 some mass data out there that some expert or some 09:52
10 lawyer could look at and say here's the universe 09:52
11 of those who fall in categories 1 and 3 but not in 09:52
12 categories 2 and 4. That doesn't exist. The data 09:52
13 is each individual participant's claim ledger, my 09:52
14 term. Am I understanding at least that correctly? 09:52

15 MR. SIGLER: I think that's correct, your 09:53
16 Honor, but let me just make sure and clarify. 09:53

17 Aetna produced data that it uses subject 09:53
18 to this relationship in the case, data across a 09:53
19 number of participants, a number of plans, 09:53
20 whatever data Aetna could identify that was 09:53
21 subject to this relationship which, of course, 09:53
22 reflected Aetna's transactions which would only 09:53
23 include the rate that Aetna paid, would not 09:53
24 include the Optum downstream rate because Aetna 09:53
25 doesn't get those, those are Optum's transactions. 09:53

1 Optum produced a set of data reflecting its 09:53
2 transactions. What the Plaintiff's expert tried 09:53
3 to do and what our expert did was, on particular 09:53
4 transactions for particular people, tried to fit 09:53
5 those two data sets together. 09:53

6 And, so, when we talk about how to 09:53
7 identify whether, for a particular person, a 09:53
8 person is in a particular category, at least the 09:53
9 starting point for that is being able to match 09:53
10 transactions from the different data sets, isolate 09:54
11 them out on a person-by-person basis and determine 09:54
12 how the downstream rates relate to the rates that 09:54
13 Aetna used to calculate benefits for that person. 09:54

14 Now very important point, your Honor, is 09:54
15 that that is just the starting point in 09:54
16 determining the impact of the Plaintiff's theory. 09:54
17 What our expert did to demonstrate that, if, for a 09:54
18 particular person, he did this for Ms. Peters, you 09:54
19 apply the Plaintiff's theory, you do what they 09:54
20 just said they want to do, which is apply 09:54
21 consistently throughout all of the person's claims 09:54
22 history their approach, what you see is that, 09:54
23 first of all, their expert excluded certain claims 09:54
24 that were subject to the relationship for his 09:54
25 analysis and it's, of course, an impact on those 09:54

1 excluded claims, and what you also see is that, 09:54
2 even on the claims that their expert analyzed and 09:54
3 our expert also analyzed, when you look at the 09:54
4 entire claims population for a person and you 09:54
5 carry their approach through that person's claims 09:55
6 history, the results change from claim to claim 09:55
7 because there is a knock-on effect from applying 09:55
8 their approach throughout a person's -- 09:55

9 THE COURT: I don't understand what you 09:55
10 mean by "a knock-on effect." 09:55

11 MR. SIGLER: Sorry, your Honor, apologies 09:55
12 the jargon. What I mean by that is that changing 09:55
13 the rate on one claim may impact subsequent claims 09:55
14 for that person and, in fact, did for Ms. Peters. 09:55
15 If you carry their approach through her claims 09:55
16 history, there are changes throughout her claims 09:55
17 history, Optum transactions, and her results, when 09:55
18 you did that, when you engaged in that kind of 09:55
19 manual claim-by-claim analysis, her results 09:55
20 flipped from someone who is claiming an injury 09:55
21 under her theory to being someone who actually 09:55
22 comes out worse off under her own theory. 09:55

23 Now that is an analysis that their expert 09:55
24 has not done at all even though he agreed that 09:55
25 that's the analysis he would need to do to figure 09:55

1 out the impact of this relationship. 09:55

2 THE COURT: Well, before we get lost in 09:56
3 the minutiae of what the experts looked at and how 09:56
4 they analyzed the data, isn't the crux of what 09:56
5 you're talking about an illustration of how each 09:56
6 individual participant's claim ledger needs to be 09:56
7 analyzed to make a determination of whether or not 09:56
8 they are, in fact, a claimant? 09:56

9 MR. SIGLER: Yes, your Honor. 09:56

10 THE COURT: Isn't that the bottom line? 09:56

11 MR. SIGLER: It requires an individualized 09:56
12 inquiry, it hasn't been done, they don't know how 09:56
13 to do it, and depending on the results of that 09:56
14 inquiry, they know that lots of people would be 09:56
15 impacted by an analysis like that, they just don't 09:56
16 know who or how many. And the implications of 09:56
17 this are very important because what this means is 09:56
18 that there are many people in their putative class 09:56
19 who would not benefit from -- their legal theory 09:56
20 of the case would not benefit from the claims in 09:56
21 this case whose interests are not aligned with the 09:56
22 theory the Plaintiffs would like to pursue on 09:57
23 their behalf. 09:57

24 THE COURT: Mr. Boone. 09:57

25 MR. BOONE: Yes, your Honor, just a few 09:57

1 additional points. I think it's important to 09:57
2 focus on Ms. Peters' liability theory from the 09:57
3 beginning. From the beginning, she has said that, 09:57
4 across the board, Aetna should have calculated its 09:57
5 members' co-insurance based on the Optum 09:57
6 downstream rates, not on the Aetna-Optum contract 09:57
7 rates, but if you do that -- or if Aetna did that, 09:57
8 if Aetna calculated its members' co-insurance 09:57
9 based only on the Optum downstream contract rates 09:57
10 without adding this credit, this benefit and 09:57
11 within deductible claims, a lot of people would be 09:57
12 worse off. And sorting that out would require 09:57
13 thousands upon thousands of individual inquiries. 09:57

14 And I guess the other point that I would 09:57
15 make is that just because some of this is shown in 09:57
16 data in digital form doesn't make it any less 09:57
17 individualized. 09:57

18 THE COURT: Mr. Knott. 09:57

19 MR. KNOTT: Yes, two points. On the data, 09:57
20 as Mr. Sigler explained, the Defendants produced 09:57
21 comprehensive data sets, including all the 09:58
22 Aetna-Optum claims whether there were overcharges 09:58
23 on the claims or not. So that data is there. 09:58
24 And, again, you can look at the data to identify 09:58
25 who is a class member under our theory. If you 09:58

1 were to determine that there were some 09:58
2 modifications required, you could again apply the 09:58
3 claims data to find the people. It doesn't 09:58
4 require you digging into each individual person's 09:58
5 file to figure that out. 09:58

6 THE COURT: Well, and that's what I don't 09:58
7 understand. How can you avoid digging into each 09:58
8 individual person's file to determine whether or 09:58
9 not they are a member of the class? Because, just 09:58
10 as Mr. Sigler, I believe, was just arguing, the 09:58
11 process of using that data would involve looking 09:58
12 at John Smith's claims. Did he make a claim for 09:58
13 procedure A? What was the quantity or the amount 09:58
14 that Aetna paid Optum? What was the amount that 09:59
15 Optum paid provider? Is there an administrative 09:59
16 delta for Optum? If the answer is yes, then you 09:59
17 put that over here on the side. Then you look for 09:59
18 the same participant, did he also have procedure 09:59
19 B? Go through that same analysis. Then you total 09:59
20 that up for the year from this data and figure 09:59
21 out, did Mr. Jones come out on the plus side or 09:59
22 the minus side? If he came out on the plus side, 09:59
23 then he's not in the class. If he came out on the 09:59
24 minus side, then he is in the class. Isn't that 09:59
25 the process that you're talking about for 09:59

1 discerning who would be defined as being within 09:59
2 the class and not? 09:59

3 MR. KNOTT: You would apply whatever rule 09:59
4 was necessary to ascertain who is -- 09:59

5 THE COURT: Wait a minute. Wait a minute. 09:59
6 If you're saying whatever rule is necessary 10:00
7 implies it's different rules for different people 10:00
8 and then -- 10:00

9 MR. KNOTT: Not at all. 10:00

10 THE COURT: -- that completely shoots 10:00
11 commonality. So I'll let you start over again. 10:00

12 MR. KNOTT: Not at all. I'm saying you 10:00
13 would determine a rule that applies to everybody, 10:00
14 a common rule, and then apply it to the data to 10:00
15 identify who is in the class. 10:00

16 THE COURT: But in order to do that, don't 10:00
17 you have to do exactly what I was just talking 10:00
18 about, looking at the proverbial participant John 10:00
19 Jones. Procedure A, is there a delta? Yes. Then 10:00
20 go to the next one. Procedure B, is there a 10:00
21 delta? Accumulate those. If there's something -- 10:00
22 if he comes out on the minus for the period of 10:00
23 time we're looking for, then he's in the class. 10:00
24 If he comes out on the plus, he's not in the 10:00
25 class. Isn't that what we're talking about? 10:00

1 MR. KNOTT: You could do that based on the 10:00
2 data and it is not an individualized inquiry 10:00
3 prohibited by Rule 23. 10:00

4 THE COURT: Well, let's break that down 10:00
5 because you said it's not an individualized 10:01
6 inquiry prohibited by Rule 23. It is an 10:01
7 individualized inquiry, isn't it? 10:01

8 MR. KNOTT: I would disagree that it's an 10:01
9 individualized -- 10:01

10 THE COURT: How can it not -- 10:01

11 MR. KNOTT: -- under Rule 23. 10:01

12 THE COURT: How -- two different 10:01
13 questions. Two different questions. Whether it's 10:01
14 an individualized inquiry and then we analyze how 10:01
15 does it fit into Rule 23. As to the first 10:01
16 question, it certainly is an individualized 10:01
17 inquiry, isn't it, because you have to go through 10:01
18 each one? You have to separate John Jones from 10:01
19 Jane Smith, each one is individualized as to the 10:01
20 plan participant, right? Do you agree with that? 10:01

21 MR. KNOTT: What I'm struggling with is 10:01
22 the word "individualized" because, in every class 10:01
23 action, you have to figure out for each individual 10:01
24 class member whether they are in the class or not. 10:01

25 THE COURT: Well, I'm not talking about 10:01

1 how this applies in other cases, I'm talking about 10:01
2 how it applies in this case. There is -- you have 10:01
3 to go into that data and make an individual 10:02
4 assessment of whether or not the claimant has come 10:02
5 out on the plus side or the minus side to 10:02
6 separate, as I say, separate the sheep from the 10:02
7 goats. You have to do that, right? Then it's 10:02
8 just a question of whether or not that prohibits 10:02
9 you from coming through the front door of Rule 23. 10:02

10 MR. KNOTT: Under the theory we are 10:02
11 proffering and our theories of relief -- again, 10:02
12 the Defendants don't get to define what our theory 10:02
13 is, we do. Our theory is that there was a breach 10:02
14 of fiduciary duty every time that a plan or a 10:02
15 member had to pay Optum's administrative fee. And 10:02
16 you have to -- if you take that theory, you can 10:02
17 then go to the data and answer the question of who 10:02
18 was charged those fees. If you take the approach 10:02
19 that if the member had some claims where the 10:02
20 actual provider would have gotten more but for the 10:02
21 way they administered the claim, and you have to 10:03
22 remove those or offset them and calculate whether 10:03
23 the member came out ahead or behind taking into 10:03
24 account those claims, you can do that based on the 10:03
25 data, too. 10:03

1 THE COURT: But you can't do that after 10:03
2 the fact, you have to do that at the front end in 10:03
3 order to define the class, correct? 10:03

4 MR. KNOTT: I think you can do it at the 10:03
5 stage where you're identifying who the class 10:03
6 members are and who has to get notice and all 10:03
7 that. 10:03

8 THE COURT: Okay. Anything else on that 10:03
9 point? 10:03

10 MR. KNOTT: No, your Honor. 10:03

11 MR. BOONE: May I add one thing, your 10:03
12 Honor? 10:03

13 THE COURT: You may. 10:03

14 MR. BOONE: A couple of times now, 10:03
15 Mr. Knott has suggested that we can sort these 10:03
16 individual issues out later at some unspecified 10:03
17 time. Well, the time is now. We're here on class 10:03
18 certification now and it was Ms. Peters' burden 10:03
19 now to prove that the requirements of Rule 23 were 10:03
20 satisfied and she hasn't done that. 10:04

21 THE COURT: The next thing that I want to 10:04
22 turn attention to, at least for a few minutes, and 10:04
23 I realize that the proposed class definitions are 10:04
24 not something that the Court is bound by, but I at 10:04
25 least want to talk about those for a few minutes 10:04

1 because I'm -- the proposed class definitions are 10:04
2 at least the Court's starting point. 10:04

3 And I note that there is an interesting 10:04
4 linguistic difference between the definition of 10:04
5 the two classes that the Plaintiff proposes, and I 10:04
6 want to make sure that I understand the difference 10:04
7 and the purpose behind the difference because 10:04
8 there are two, one called plan claim class and the 10:05
9 other one called the member claim class. Whereas, 10:05
10 the first one, the plan claim class is where Aetna 10:05
11 is the administrator for self-insured plans and 10:05
12 then the second one is where Aetna is, in fact, 10:05
13 the insurer. 10:05

14 And am I understanding that correctly, at 10:05
15 least so far? 10:05

16 MR. KNOTT: Yes, your Honor. 10:05

17 THE COURT: Okay. Turning first to the 10:05
18 plan claim class and dissecting this sentence -- 10:05
19 it's not a sentence, it's a definition. All plan 10:05
20 participants and beneficiaries, so, in other 10:05
21 words, the people who are enrolled in the plan, 10:05
22 people, of self-insured ERISA health insurance 10:05
23 plans administered by Aetna, so people in 10:06
24 Aetna-administered plans, and here's where I run 10:06
25 aground, for which, "which" is a non-personal -- 10:06

1 it's not a personal pronoun, therefore, it doesn't 10:06
2 refer back to people, it refers back to the plan, 10:06
3 so all people in self-insured plans which plans -- 10:06
4 or for which plans the plan responsibility for a 10:06
5 claimant -- excuse me, for a claim was assessed 10:06
6 using method in question. So it's all people in 10:06
7 self-insured plans which plans use this method. 10:06
8 That defines every participant in the plan, 10:07
9 doesn't it? Whether they made a claim or not, 10:07
10 they are members of the class, right? Are we 10:07
11 really defining the class that broadly that it's 10:07
12 every person whose health insurance is in one of 10:07
13 these self-insured plans for which Aetna is the 10:07
14 plan administrator regardless of whether or not 10:07
15 their name even shows up on the data? Am I 10:07
16 reading that right? 10:07

17 MR. KNOTT: I think that is a correct 10:07
18 reading of the definition, your Honor. In that 10:07
19 ERISA Section 502(a)(2) gives participants and 10:07
20 beneficiaries the ability to challenge breaches of 10:07
21 fiduciary duty on behalf of their plans and bring 10:07
22 claims on behalf of their plans. 10:07

23 THE COURT: But a claim on behalf of the 10:08
24 plan would be in the nature of a derivative claim 10:08
25 as opposed to a class action claim, wouldn't it? 10:08

1 MR. KNOTT: You can -- you can bring a 10:08
2 502(a)(2) claim as a class action claim. So, for 10:08
3 example, Ms. Peters clearly has a 502(a)(2) claim 10:08
4 on behalf of the Mars plan and she has standing to 10:08
5 bring that claim and she has standing to bring a 10:08
6 claim on behalf of the other members of the other 10:08
7 plans who were similarly affected under Rule 23. 10:08
8 She has the ability to do that. 10:08

9 THE COURT: How can a -- because the 10:08
10 self-insured plans administered by Aetna, there 10:08
11 are hundreds of them across the country, correct? 10:08

12 MR. KNOTT: Correct, thousands. 10:08

13 THE COURT: So, if I am a participant in 10:08
14 one of those self-insured plans, I can bring a 10:08
15 derivative claim claiming a breach of fiduciary 10:08
16 duty on behalf of some other participant in some 10:09
17 other plan or thousands of other plans regardless 10:09
18 of the fact that I don't have anything to do with 10:09
19 those plans? You're saying that I can do that as 10:09
20 a participant in my one Aetna plan. 10:09

21 MR. KNOTT: As a participant in one Aetna 10:09
22 plan, you can represent on a class basis other 10:09
23 members of other plans that were similarly 10:09
24 affected. 10:09

25 THE COURT: Do you have any case law that 10:09

1 allows for that broad an application, in other
2 words, a stacking of this class action
3 representative ability on top of the derivative
4 representative ability of a particular plan -- a
5 plan participant in a particular plan?

6 MR. KNOTT: Your Honor, I don't have a
7 specific case that certifies an (a)(2) class
8 related to other plans, but I do have -- there are
9 numerous cases that approve of a participant like
10 Ms. Peters representing participants and
11 beneficiaries of other plans on their claims and
12 there's nothing about (a)(2) that suggests that
13 that should be -- that remedy should be excluded
14 from the class action proposed.

15 THE COURT: Let me hear from Mr. Sigler
16 and Mr. Boone on this. Is Mr. Knott correct that,
17 particularly with these self-insured plans, that
18 even though Ms. Peters can bring this sort of
19 breach of fiduciary duty derivative claim on
20 behalf of all of her plan participants, she can
21 bring it on behalf of all plan participants in all
22 such self-insured plans?

23 MR. SIGLER: She cannot, your Honor,
24 and --

25 THE COURT: Do you have any case law that

1 backs that up? 10:11

2 MR. SIGLER: We do have a case, the Berry 10:11
3 case out of the District of South Carolina holds 10:11
4 that there is an Article III problem with that 10:11
5 type of a claim because the Plaintiff does not 10:11
6 have any concrete injury related to those other 10:11
7 plans that she's seeking to sue on behalf of. So 10:11
8 we rely on the Berry case. 10:11

9 In addition to that, this case and the 10:11
10 evidentiary record here makes it particularly 10:11
11 problematic for a claimant to assert a claim like 10:11
12 that because, of course, there are significant 10:11
13 differences between the Plaintiff's plan and these 10:11
14 other plans, both in terms of the contracts 10:11
15 governing those relationships and the economic 10:11
16 interests of those other plans, many of whom 10:11
17 benefit from this relationship significantly, may 10:12
18 want to continue those benefits of having this 10:12
19 relationship and, of course, we've addressed 10:12
20 extensively in our papers the plan-specific 10:12
21 contracts or communications with those other 10:12
22 plans. And those plans, those other plans also 10:12
23 are subject to arbitration provisions in their 10:12
24 contracts with Aetna to the extent she is 10:12
25 purporting to sue derivatively on behalf of those 10:12

1 plans. So you really get into a whole host of 10:12
2 individualized plan-specific issues once you get 10:12
3 outside of Ms. Peters' specific plan and, again, 10:12
4 that's assuming you can get past that initial 10:12
5 Article III threshold, which she cannot. 10:12

6 THE COURT: Mr. Boone. 10:12

7 MR. BOONE: Yes, your Honor. Just one 10:12
8 Optum-specific twist on that. There can be no 10:12
9 derivative claim at all under 502(a)(2) against 10:12
10 Optum because 502(a)(2) is about fiduciary 10:12
11 breaches, and as this Court has already held, 10:12
12 Optum has served no fiduciary function at all 10:12
13 under these relationships. 10:12

14 MR. KNOTT: It sounds like a common issue, 10:12
15 your Honor. 10:12

16 THE COURT: Mr. Knott, I didn't follow how 10:13
17 what you said related to what Mr. Boone said. 10:13
18 Maybe I'm -- 10:13

19 MR. KNOTT: His argument is that Optum 10:13
20 can't be sued under the 502(a)(2). They've 10:13
21 adopted other arguments in their recently filed 10:13
22 summary judgment motion that are clearly common 10:13
23 arguments that are not specific to Ms. Peters. 10:13

24 On Mr. Sigler's point about the Berry 10:13
25 case, I would just point to the Fallick case from 10:13

1 the Sixth Circuit, I believe it's the NECW case 10:13
2 from the Second Circuit cited in our brief, the 10:13
3 Forbush case that allowed a class member like 10:13
4 Ms. Peters to represent members of other plans 10:13
5 with regard to their claims. Under ERISA, I think 10:13
6 those cases are better and more persuasive than 10:13
7 the Berry case. 10:13

8 THE COURT: You said Forbush from the 10:13
9 Second Circuit? 10:13

10 MR. KNOTT: Fifth Circuit. 10:13

11 THE COURT: Fifth Circuit. 10:13

12 MR. KNOTT: There's the Fallick, 10:13
13 F-A-L-L-I-C-K, decision from the Sixth Circuit. 10:13
14 There's a Second Circuit case, I believe it's the 10:14
15 NECW case; I'll check that. And the Forbush case 10:14
16 from the Fifth Circuit. 10:14

17 MR. BOONE: Your Honor, may I? 10:14

18 THE COURT: You may. 10:14

19 MR. BOONE: Your Honor discussed the EQT 10:14
20 case earlier; it's one of my favorite cases as it 10:14
21 turns out. Mr. Knott is making precisely the 10:14
22 argument that the Fourth Circuit rejected in EQT. 10:14
23 Rule 23 does not tie this Court's hand from 10:14
24 deciding antecedent legal questions in going 10:14
25 through the Rule 23 analysis. In fact, for 10:14

1 Duke's, Rule 23 demands it in many cases and 10:14
2 that's what we're arguing here. 10:14

3 THE COURT: Yes, Mr. Knott. 10:14

4 MR. KNOTT: I actually really like 10:14
5 Mr. Boone's reference to Duke's because I embrace 10:14
6 Duke's. Duke's shows why we have common questions 10:14
7 where the Plaintiffs in Duke's did not. What the 10:14
8 Plaintiffs in Duke's were challenging was 10:15
9 Walmart's assignment of discretion to individual 10:15
10 managers to make employment decisions. And, so, 10:15
11 there was no glue, there was no common 10:15
12 discriminatory policy binding the class together. 10:15
13 Here, we have a common policy, the policy to 10:15
14 charge plans and members for Optum's 10:15
15 administrative fees in violation of the terms of 10:15
16 the plan. We have common plan language. 10:15
17 Mr. Sigler said that the plans vary, but if you 10:15
18 look at the evidence we submitted, they really 10:15
19 don't vary in any material sense. 10:15

20 Aetna's position is it was entitled to 10:15
21 treat Optum as a health care provider and the 10:15
22 Optum rate is a negotiated charge under the plans 10:15
23 and require plans and members to pay it. Our 10:15
24 position is that that was not proper. And that is 10:15
25 a common question that is fundamental to the 10:15

1 claims of every class member. And that's -- those 10:15
2 are just two reasons why our case is so different 10:15
3 from Duke's. We presented common issues, common 10:16
4 legal claims that rely on evidence of the common 10:16
5 policy practice. 10:16

6 THE COURT: Okay. With regard to the 10:16
7 issue of class certification, is there anything 10:16
8 that any of you on either side are dying to say 10:16
9 that you haven't been given an opportunity to say? 10:16
10 Okay. 10:16

11 I really want to move to the expert issue 10:16
12 only briefly. And, Mr. McDevitt, you said that 10:16
13 you were going to take the lead on that. I assume 10:16
14 that means that you probably have something that 10:16
15 you want to say, but I felt that I understood that 10:16
16 issue pretty well. It's a much simpler issue than 10:16
17 what we've been talking about for the last hour 10:16
18 and a half, but, Mr. McDevitt, I'll hear from you 10:17
19 if you have something that you want to say in 10:17
20 supplement to what you have submitted in writing. 10:17

21 MR. McDEVITT: No, your Honor, we will 10:17
22 rest on what we've filed. Happy to address any 10:17
23 questions that the Court might have, but, 10:17
24 otherwise, no, I was just sort of identifying who 10:17
25 was going to be speaking as necessary. 10:17

1 THE COURT: Okay. 10:17

2 MR. KNOTT: Your Honor, with the Court's 10:17
3 indulgence, I would like to say just one more 10:17
4 thing about the conflicting theories about how 10:17
5 relief should be addressed in this case and what 10:17
6 the claims are. 10:17

7 THE COURT: Okay. 10:17

8 MR. KNOTT: The Defendants' position is 10:17
9 that this is a challenge to the Aetna-Optum 10:17
10 relationship and that the relief we're seeking is 10:17
11 going to wipe out their relationship, wipe out 10:17
12 their contracts and that, therefore, to look at 10:17
13 the harm in the case, you have to look 10:17
14 holistically at the entire Aetna-Optum 10:17
15 relationship. That's not where our case is. Our 10:17
16 case is a challenge to their common practice of 10:17
17 requiring members in plans to pay Optum's 10:17
18 administrative fees. That's -- 10:18

19 THE COURT: How are those two things any 10:18
20 different? 10:18

21 MR. KNOTT: Because if you look at the 10:18
22 briefs, there's a lot of argument from the 10:18
23 Defendants about how they were motivated to save 10:18
24 money, although the documents show they had a 10:18
25 motive to bury the fees in the claims, that they 10:18

1 cut costs through this relationship, they cut 10:18
2 care, they -- Optum negotiated lower prices than 10:18
3 Aetna could have negotiated, and those are 10:18
4 attendant benefits of the contracts between these 10:18
5 two parties that we're trying to get rid of. 10:18
6 That's not what this case is about. And that's 10:18
7 why this analysis that their expert has conducted, 10:18
8 which is really something imported from the 10:18
9 antitrust world, is so far afield from what's 10:18
10 required to show harm, unjust gain to a fiduciary 10:18
11 under ERISA. 10:18

12 THE COURT: Okay. On the Defendants' 10:18
13 side, anything you want to say with regard to 10:19
14 either what Mr. Knott just addressed or with 10:19
15 regard to the expert issue? 10:19

16 MR. SIGLER: Well, your Honor, I know 10:19
17 we're not here today to argue the merits, so I 10:19
18 won't respond to his characterizations of the 10:19
19 relationship or the reasons for it, although you 10:19
20 understand from the briefs we disagree with much 10:19
21 of what he just said. 10:19

22 I just wanted to make the point, and this 10:19
23 was in our briefs at least briefly, but it's 10:19
24 highlighted by something Mr. Knott just said. If 10:19
25 their case is about decisions made when this 10:19

1 relationship was set up, established, entered into 10:19
2 in 2011 and 2012, and of course it is, it's about 10:19
3 the structure of this relationship, this Court has 10:19
4 already recognized and we think the law is very 10:19
5 clear that that is not a fiduciary act when Aetna 10:19
6 was entering into these relationships in 2011 and 10:19
7 2012. So I just wanted to make sure that that was 10:19
8 highlighted. 10:19

9 When Mr. Knott says our case is about a 10:19
10 common policy, it satisfies Duke's, the "policy" 10:19
11 he's relying on, the evidence he uses to say there 10:20
12 is a common policy consists of contracts and 10:20
13 communications around the contracts that really 10:20
14 don't even implicate a fiduciary function of 10:20
15 Aetna. That is a threshold failing of their 10:20
16 theory that, under the EQT case that's been talked 10:20
17 about a lot today, is an additional reason to deny 10:20
18 class certification. 10:20

19 I certainly don't want to get us 10:20
20 sidetracked, your Honor, but I think that's a very 10:20
21 important point and an additional reason to deny 10:20
22 their motion. 10:20

23 THE COURT: Okay. I don't want to open a 10:20
24 new Pandora's box here, but how does that relate 10:20
25 to the class certification issue? That seems to 10:20

1 be something downstream from class certification. 10:20

2 MR. SIGLER: Only, your Honor, that, under 10:20
3 the EQT case, what the Fourth Circuit said is that 10:20
4 if there is a threshold legal failing in the 10:20
5 Plaintiff's class certification theory, the Court 10:20
6 should address that and deny the motion, not take 10:20
7 it down the road. And we think that issue 10:20
8 qualifies. I understand your Honor's question, 10:20
9 but that would be the point I'd make on that. 10:21

10 THE COURT: Yes, Mr. Knott. 10:21

11 MR. KNOTT: Two points. First of all, 10:21
12 what Mr. Sigler just said is an obvious common 10:21
13 issue that would pertain to every class members' 10:21
14 claim, whether Aetna was acting as a fiduciary or 10:21
15 not. 10:21

16 The second point is that this case is a 10:21
17 challenge to the benefits determinations that 10:21
18 Aetna made and the policy that it carried out in 10:21
19 each and every benefit determination for the 10:21
20 proposed class members of requiring plans and 10:21
21 members to bear Optum's administrative fees. That 10:21
22 is a decision that Aetna made as a fiduciary 10:21
23 applying the plans. It said it was allowed to do 10:21
24 it under the plans; we disagree. 10:21

25 THE COURT: You started out by saying that 10:21

1 the issue that Mr. Sigler just addressed is an 10:21
2 issue that is common to all of the claims that any 10:21
3 participant would have, but under -- just like 10:22
4 Mr. Sigler said, under EQT, EQT talked about how 10:22
5 if that one particular Virginia case, I can't 10:22
6 remember the name of the case, disposed of the 10:22
7 question of whether or not there were retained 10:22
8 methane rights, that that was a threshold question 10:22
9 that should be addressed and disposed of before 10:22
10 determining the class certification and class 10:22
11 membership. So if I determine that Mr. Sigler is 10:22
12 correct on that issue, isn't that a threshold 10:22
13 determination that I need to address before we 10:22
14 even get to class certification and class 10:22
15 membership because it determines who is a claimant 10:22
16 and who is not a claimant? Do I understand that? 10:22

17 MR. KNOTT: I actually disagree with that 10:22
18 because -- 10:22

19 THE COURT: That doesn't surprise me. 10:22

20 MR. KNOTT: -- I think the issue in EQT 10:23
21 was if the Virginia case had held a certain way, 10:23
22 then you would have to conduct an individualized 10:23
23 inquiry into each class member's history of 10:23
24 acquiring the land and what they had as far as 10:23
25 their implied deed and all of that in order to 10:23

1 figure out whether they had a claim or not. Here, 10:23
2 the question of whether Aetna acted as a fiduciary 10:23
3 or not is a predicate to fiduciary duty breach 10:23
4 liability. And there's not a -- it's a factual 10:23
5 question that can be answered with common 10:23
6 evidence, specifically, Aetna's admission that it 10:23
7 decided, for all of its plans, that it was going 10:23
8 to treat Optum's fee this way, the common evidence 10:23
9 about what Aetna did, it administered every single 10:23
10 one of these plans. And if Aetna is going to 10:23
11 argue that it didn't act as a fiduciary when it 10:23
12 decided, in its benefits determinations, to charge 10:23
13 everybody for that, that's an issue that's going 10:23
14 to be common to the class. 10:24

15 And, again, Amgen, the Supreme Court has 10:24
16 cautioned you do not get into the merits, you 10:24
17 don't make merits decisions except to the extent 10:24
18 necessary to certify the class and it's not 10:24
19 necessary to certify the class to figure out 10:24
20 whether Aetna's right when it says we weren't a 10:24
21 fiduciary, we are entitled to act in our own 10:24
22 self-interest and require everybody to pay these 10:24
23 fees or whether it was, indeed, acting as a 10:24
24 fiduciary when it made the benefits determinations 10:24
25 at issue. 10:24

1 THE COURT: Okay. Mr. Boone, I didn't 10:24
2 mean to ignore you, Mr. Knott was very anxious 10:24
3 there to make his point, so I went out of turn, 10:24
4 but I'll turn to you now. 10:24

5 MR. BOONE: That's fine, your Honor. 10:24

6 The last thing that I would say is that 10:24
7 we're not trying to transform this into an 10:24
8 antitrust case, we're just taking Ms. Peters' 10:24
9 liability theory at face value. From the very 10:24
10 beginning, she has said that Aetna, in every 10:24
11 instance, should have applied the Optum downstream 10:24
12 rate. If Aetna did that, lots of people would be 10:25
13 worse off. Figuring that out would require lots 10:25
14 of individual inquiries. You can't do it through 10:25
15 common evidence. So we are taking her theory at 10:25
16 face value, we're not trying to reshape it for our 10:25
17 own purposes. 10:25

18 THE COURT: Okay. Does anybody else have 10:25
19 anything that they want to address, any other 10:25
20 point you want to make that you haven't had an 10:25
21 opportunity to make today? 10:25

22 MR. BOONE: Not from us, your Honor. 10:25

23 THE COURT: We will try to get an order 10:25
24 out on this as quickly as possible. To state the 10:25
25 obvious, this is a rather complex matter. I'm not 10:25

1 going to be able to get it out by next Friday. 10:25

2 It's going to take us a little while to get this 10:26
3 done just because of the nature of the complexity, 10:26
4 but we will try to do it as expeditiously as we 10:26
5 can. 10:26

6 MR. SIGLER: Thank you, your Honor. 10:26

7 MR. BOONE: Thank you, your Honor. 10:26

8 THE COURT: When we adjourn, Mr. McDevitt 10:26
9 and Mr. Holman, if I could talk to the two of you 10:26
10 for a moment in chambers about something that has 10:26
11 absolutely nothing to do with this case. 10:26

12 (The proceedings were concluded at
13 approximately 10:26 a.m.)

REPORTER'S CERTIFICATE

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

I, BEVERLY BOURLIER JAMES, certify that
I was authorized to and did stenographically report
the foregoing proceedings and that the transcript is
a true and complete record of my stenographic notes.

Dated this 4th day of March, 2019.

BEVERLY BOURLIER JAMES
Registered Professional Reporter
Certified Realtime Reporter
Certified LiveNote Reporter
Florida Professional Reporter
Georgia Certified Reporter
NCRA Realtime Systems Administrator

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